

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JEFFREY J. NOLL

CASE NO. 96-60388

Debtor

Chapter 7

APPEARANCES:

DAVID A. LONGERETTA, ESQ.
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CAROLYN COOLEY, ESQ.
Trustee and Attorney for
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HAROLD GOLDBERG, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Matthew Cuda ("Cuda") has moved this Court for an order pursuant to Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9024 and Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 60(b) either modifying or setting aside an Order of this Court dated March 28, 1996, which granted a motion of Carolyn J. Cooley, Esq., Trustee herein ("Trustee") rejecting a certain lease ("Lease") of real property which property is located at 200 North Main Street, Herkimer, New York ("Property").

This motion initially appeared on this Court's motion

calendar at Utica, New York on April 23, 1996. It was opposed by the Trustee and by Gary Cioch ("Cioch"), a non-debtor one half owner of the Lease and the Property. Following oral argument the motion was scheduled for an evidentiary hearing on June 12, 1996. The evidentiary hearing was held and the matter was submitted for decision as of that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a) and (b)(1) and (2)(0).

FACTS

On February 2, 1996, Jeffrey J. Noll ("Debtor") filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). Listed among Debtor's assets was a joint interest in the Property. Debtor's petition contained no reference to the Lease.

Subsequent to the filing of the petition and upon information obtained by the Trustee, she filed a motion with this Court on March 6, 1996 pursuant to Code §365(a) ("Rejection Motion"), seeking to reject the Lease which purportedly had been entered into by and between the Debtor and Cioch as lessors and Cuda as lessee on or about January 26, 1996, approximately one week prior to the filing of Debtor's Chapter 7 petition. The Lease provided for payments of \$2,000 per month and was to run for a term

of fifteen years, expiring on January 26, 2011. (See Movant's Exhibit 1).

The Trustee's Rejection Motion was served upon Cuda at the address of the Property. Cuda did not appear in opposition to the Rejection Motion and the Motion was granted by the Order dated March 28, 1996 ("Rejection Order").¹

On April 11, 1996, Cuda filed the instant motion seeking to either set aside or modify the Rejection Order on the grounds that Cuda was not properly served with the Trustee's Rejection Motion, that the Trustee's proposed sale of the Premises is legally impossible and if approved will cause Cuda irreparable harm. Finally, Cuda contends that Code §365(h)(1)(A)(ii) prohibits his removal from the Premises even though the Trustee may have successfully rejected the Lease.

At the argument of the motion and again at the evidentiary hearing, Cuda withdrew his contention that he had not been properly served with the Trustee's Rejection Motion, but continued to assert that the Trustee could not sell the Premises free and clear of his rights under the Lease.

DISCUSSION

The Trustee asserted and has attempted to prove that the Lease dated January 26, 1996, was not executed on that date and, in

¹The Court observes, without reaching any conclusion, that the Trustee's Rejection Motion is somewhat inconsistent with her position herein that the Lease was executed post-petition and was not in existence at the time the Debtor filed his Chapter 7 petition.

fact, was executed at some time post-petition and backdated to January 26th to make it appear that Cuda had leasehold rights in the Premises as of the date of the filing of Noll's bankruptcy petition.

Cuda, during his testimony, identified a copy of the Lease bearing the signatures of the Debtor and Gary Cioch as landlords and Cuda as tenant. The Lease also bears the signature of John Noll, Debtor's brother, as witness. Cuda further testified that the Lease was prepared in his handwriting and was executed in the office of a Herkimer attorney though the attorney neither prepared nor participated in the execution of the Lease. Cuda also produced a copy of a check drawn on the account of one of Cuda's businesses, "The Playground Restaurant and Lounge", in the sum of \$4,000 payable to John Noll. The check was also dated January 26, 1996, and appears to bear the notation "1st & last pmt. Her.". (See Movant's Exhibit 2). Cuda testified that the check was a deposit required by the Lease and was made payable to John Noll because he was the "acting real estate agent or whatever you want to call it" for the Debtor and Cioch and had their consent to the check being made payable to him. The check was endorsed by "John Noll" and further endorsed "For Deposit Only Central Heating & Plumbing". Cuda testified that he believed Cioch was the owner of Central Heating and Plumbing.

On cross examination by the Trustee, Cuda testified that John Noll "put the whole deal together", but denied that he had any business relationship with John Noll. He also acknowledged that the check was deposited in Fleet Bank on February 2, 1996 and paid

by Cuda's bank, Upstate Federal Credit Union, on February 5, 1996, as indicated on the back of the check (see Movant's Exhibit 2).

On cross examination, Cuda contended that he has made payment of additional rent in the sum of \$6,000, but those funds are being held by his attorney and have not been paid over to the Debtor or Cioch.

Cuda testified that he first entered the Premises on the date the Lease was executed and initially did some clean up work. He testified that he first became aware of the Debtor's bankruptcy on February 16, 1996, when he was asked by Debtor's attorney, David Longeretta, to provide him with a copy of the Lease.

The Debtor testified on examination by the Trustee that he had never denied the existence of the Lease and believed that a statement to that effect may have been made by John Noll. Debtor also acknowledged that his Chapter 7 bankruptcy petition did not list his interest in the Lease, though he believed that it had been discussed with his attorney prior to the execution of the petition. (See Trustee's Exhibit C).²

On cross-examination by Cuda's attorney, the Debtor testified that he executed the Lease and that he executed it on January 26, 1996, in the presence of the other signatories to the Lease. However, on examination by Debtor's attorney, David Longeretta, Debtor indicated that a lease for the Premises with Cuda was discussed prior to the filing of his Chapter 7 petition

²The Court notes that Schedule G, Executory Contracts and Unexpired Leases to Debtors Chapter 7 petition lists "Leasehold Green Street Cafe Non-Res" with the other parties to the leasehold being John Noll and Gary Cioch. On direct examination by the Trustee, Debtor denied that he was a party to this lease.

and that John Noll had indicated "'we had a mostly verbal lease' is what I remember him saying - we had drawn up a lease but it wasn't..." Debtor did not complete his answer. On further direct examination by the Trustee, however, Debtor completed his answer "at a later date we were going to write up a more thorough lease I believe". Debtor then stated that by a more thorough lease he meant that the inclusion of "Utilities and upkeep and things like that, that it wasn't a thorough lease, but we did have a written lease we had gotten at Hummels."³

As indicated, while Cuda no longer asserts a lack of the notice of the Trustee's Rejection Motion, he does, however, continue to assert his rights under Code §365(h)(1)(A)(ii). The Trustee contends that the Lease under which Cuda asserts those rights was executed post-petition, presumably backdated to January 26, 1996, and is, therefore, a nullity for purposes of the statute relied upon.

Upon consideration of all of the credible evidence, the Court does not believe that the Trustee has met her burden of proof. See In re Demis, 191 B.R. 851, 857 (Bankr. D.Mont. 1996).⁴ While it is true that the Debtor did not list the Lease as an asset in his Chapter 7 bankruptcy petition which he filed some seven days

³Cuda had previously testified that he had obtained the Lease form at "Hummels". The Court also notes that the Lease at paragraph "Ninth" does reference utilities and services being the obligation of the tenant.

⁴While procedurally the instant dispute is a contested matter governed by Fed.R.Bankr.P. 9014, the Trustee's opposition is in the nature of an affirmative defense asserted pursuant to Fed.R.Bankr.P. 7008, which incorporates by reference Fed.R.Civ.P. 8(c).

after executing the Lease, there is no direct proof that the copy of the Lease, identified by both Cuda and the Debtor and received in evidence, together with the so-called deposit check in the sum of \$4,000, were executed and issued other than on the dates referenced therein. Cuda's explanation of the events surrounding the execution of the Lease on January 26, 1996, in spite of the Trustee's effort to challenge his credibility, has not been contradicted by the testimony of any witness proffered by the Trustee. While there did appear to be some confusion between Debtor and his counsel as to when and where Debtor's petition was prepared and executed and what information was imparted by Debtor to counsel regarding the Lease, it did not rise to the level of convincing this Court that the Lease was a post-petition creation by the parties which would prevent Cuda from invoking his rights under Code §365(h)(1)(A)(ii).

Having concluded that the Lease was validly executed on January 25, 1996, the Court turns its attention to Cuda's rights as a tenant under a Lease that has been rejected by the Trustee. Pursuant to Code §365(h)(1)(A)(ii) a trustee can reject an unexpired lease and be relieved of any obligation of future performance under the lease; however, a trustee cannot deprive the lessee of its right to remain in possession of the leasehold estate. In re Wood Comm. Fund I, Inc., 116 B.R. 817, 818 (Bankr. N.D.Okla. 1990); see also In re Upland/Euclid, Ltd., 56 B.R. 250, 252 (9th Cir. BAP 1985) (Debtor/lessor cannot deprive the lessee of its possessory interest in the lease premises.) It is clear that Congress intended to provide a non-debtor lessee the full benefit

of its bargain with the debtor/trustee by allowing the lessee to remain in possession of the leasehold for the balance of the term of the lease if it so desires. See In re Chestnut Ridge Plaza Associates, L.P., 156 B.R. 477, 481 (Bankr. W.D.Pa. 1993); In re Lee Road Partners, Ltd., 155 B.R. 55, 60-61 (Bankr. E.D.N.Y. 1993); aff'd 169 B.R. 507 (E.D.N.Y. 1994). While the majority of cases interpreting Code §365(h)(1)(A)(ii) involve a Chapter 11 debtor in possession, the statute is clearly applicable in a Chapter 7 setting and, accordingly, Cuda is entitled to remain in possession of the Property as long as he is in compliance with the terms of the Lease. There was no credible proof before the Court that Cuda had breached the Lease, although he responded to the Trustee on cross examination that since the \$4,000 deposit, the monthly rent had not been paid to any third party, but was being held in escrow by his attorney for reasons Cuda was unaware of.

In summary, the Court concludes that the Lease was executed pre-petition, that it has been rejected by the Trustee pursuant to Code §365(d)(1), but that pursuant to Code §365(h)(1)(A)(ii), Cuda has opted to and may retain his rights of possession under the Lease, as defined in that Section.⁵

IT IS SO ORDERED.

Dated at Utica, New York

this 2nd day of July 1996

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁵In reaching the decision, the Court makes no finding with regard to the rights of the non-debtor, co-owner, co-lessor Gary Cioch, nor does it consider the ability of the Trustee as a co-lessor to reject the entire Lease.